RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

MARY B. TRUE *v.* DANIEL C. EMERY ET AL.

Where two several creditors simultaneously attach a debtor's real estate, consisting of an equity of redemption, as between themselves an undivided half thereof becomes holden as attached on each writ, and the equity may be sold in moieties upon executions recovered upon such writs, one undivided half upon each execution, where neither moiety is sold upon the execution for a sum exceeding the amount due thereon.

Where an officer in his return of a sale of an equity upon execution declares that he published in a certain newspaper the notice which the statute requires to be given, it is not competent for the debtor, or any one claiming under him, to contradict the officer's return by the production of such newspaper, showing the return to be untrue.

There is no legal necessity of returning to the clerk's office, within any definite time, the execution upon which an equity has been sold by an officer, in order to make the sale valid as against a subsequent purchaser. The registry of deeds (by statute) discloses the state of the title in such case.

BILL IN EQUITY, to redeem a farm in Gorham, from a mortgage by Merrill W. Mosher to one David D. Thorn and his assigns, to secure the payment of $2500, in one year from date, May 1st 1871, with interest; the right of redemption having been assigned to the complainant by Mosher, by his deed of March 30th 1874.

The bill set out that at the October term 1873, the mortgagee, Thorn, recovered a conditional judgment against Mosher, for $2760.20 debt, and $31.86 costs; that Thorn assigned this judgment to Emery, January 19th 1874, who, on failure of payment of the judgment, April 22d 1874, sued out an alias writ of possession, whereby Emery was put into full possession of the mortgaged premises, on May 14th 1874; that the plaintiff, as assignee of Mosher, delivered to Emery a request in writing for a true account; and that Emery refused to comply therewith. The bill closed with a prayer that Emery, Thorn and Libby be required to answer, and that she be permitted to redeem, and for other relief.

The defendant, Emery, admitted the foregoing facts. But set up in defence, that on July 9th 1874, the time of the admitted demand, the complainant had no right to make it or to redeem; that on March 7th 1872, the right in equity of Mosher to redeem was attached simultaneously on two several writs, in two suits, on that day commenced against him and returnable to the superior court, one in favor of him, the said Emery, and the other in favor of his

co-defendant, Libby, and in each judgment was recovered by the respective plaintiffs at the April term 1873, and executions issued, on each of which a deputy sheriff, May 17th 1873, seized an undivided moiety of said Mosher's right in equity, and after due proceedings had, on June 27th 1873, to satisfy said two executions, sold both of said undivided moieties, one on each execution, to the said Libby, and on the same day executed to him two several deeds thereof, whereby Libby became seised and the lawful owner of the whole of said Mosher's right in equity to redeem, subject only to the right of said Mosher or his assigns to redeem from the sales on said executions within one year thereafter, and that the year expired June 7th 1874, and Libby then became the absolute owner of the whole of the equity.

F. O. J. Smith, for the complainant, contended that there was no statute authorizing an officer to seize and sell by auction on execution, a moiety or any fractional part of a debtor's right to redeem his real estate from a mortgage; that the purchaser cannot compel a mortgagee to relinquish any part of his mortgage security, short of the whole, and only on payment of the full amount of the mortgage debt; nor can a party, by the purchase of one part, acquire the right to redeem an encumbrance on another part.

A creditor may, at his own hazard of removing by agreement existing encumbrances, levy upon a fractional part of his debtor's mortgaged real estate by metes and bounds, as was done in the case of *Franklin Bank* v. *Blossom*, 23 Maine 546; but he cannot have the encumbrance deducted from his appraisement, as is virtually done by selling an entire equity of redemption: *Warren* v. *Childs*, 11 Mass. 222.

The statute points out the mode of reaching the debtor's interest: Rev. Stats., c. 76, § 29, and c. 87, § 21; and does not authorize the sale of numerous equities for one sum, nor the reduction of an equity to less than an entirety and the sale of a fractional part, and the imposing upon it the entire encumbrance.

Counsel contended and argued elaborately and at length that the equity could not be split; and under various positions taken cited, besides some of the cases appearing in the opinion, the following: *Bacon* v. *Leonard*, 4 Pick. 277; *Shove* v. *Dow*, 13 Mass. 529; *Allyn* v. *Burbank*, 9 Conn. 151; *Young* v. *Williams*, 17 Id. 393; *Jessup* v. *Batterson*, 5 Day (Conn.) 371; *Franklin* v. *Gorham*, 2 Id. 149.

G. B. Emery, for the defendants.

A debtor can convey one moiety of his equity to one person and the other to another by one deed, or by separate deeds. If he should convey the whole equity to one and the whole equity to another at precisely the same time by deeds recorded simultaneously, the grantees would take in moieties. The same is the result of a statute conveyance by the officer.

The opinion of the court was delivered by

PETERS, J.—The main question to be decided is, whether an equity of redemption can be sold in separate portions or shares, by an officer, upon different executions, under the particular circumstances existing in this case. The precise question presented has never before arisen in any reported case in this state, nor has it been decided elsewhere, under a statutory system like our own, that we are aware of.

Two several creditors made simultaneous attachments upon a debtor's real estate. The property attached turned out to be an equity of redemption. By virtue of the attachments, upon executions afterwards obtained, the equity was sold in moieties at the same time to the same bidder by the officer holding both executions, one undivided half thereof upon one execution and the other half upon the other. Can the sales be upheld? We think they can. If not, then the circumstance that the attachments were made at the same time renders them both void. Attachments made at the same instant stand upon an equal footing. Neither can exclude the other. Each covers the whole estate as far as the debtor is concerned, and one-half thereof as between each other; where neither moiety is appraised upon execution for a sum exceeding the amount due thereon: *Fairfield* v. *Paine*, 23 Me. 498; *Durant* v. *Johnson*, 19 Pick. 544.

The complainant relies upon several authorities to show the sales to be void. We think the position taken is not sustained by the cases cited.

In *Stone* v. *Bartlett*, 46 Maine 438, it was held that several distinct equities could not be sold upon execution together for a gross sum, but should be sold separately. The same decision is repeated in the case of *Smith* v. *Dow*, 51 Maine 21. *Fletcher* v. *Stone*, 3 Pick. 250, decides the same question in the same way. The reason of the decision in those cases is, that a debtor has the

right of redeeming one equity without redeeming the other. No such reason can apply in this case.

In *Chapman* v. *Androscoggin Railroad*, 54 Maine 160, it was determined that our statutes do not permit the sale of an equity of redemption upon two or more executions jointly in favor of two creditors. Undoubtedly, such a proceeding was awkward and illogical in the extreme. Nor was there any necessity for it in that case. There the attachments were successive in point of time and not simultaneous. The equity could have been sold on one execution under the provisions of our statutes: Rev. Stats., c. 84, § 21. But here it is different. The equity could not be sold on one execution, because one-half of the equity only could be held as attached thereon. It became necessary to provide a way to make such sales as would save both attachments and make them effectual. The distinction between that case and this is a marked one, and the reasons upon which the conclusion in that case must rest, although having some appearance of it, are not really pertinent to such a state of facts as is presented here.

While we do not regard the foregoing cases as militating against, there are several cases which by their force and effect strongly support our present view. In *Franklin Bank* v. *Blossom*, 23 Maine 546, it was decided that where land situated in two adjoining towns is included in the same mortgage, an officer may sell the right of redeeming the land within one of the towns only. That decision approaches to the proposition sought to be established in this case, very nearly. If an officer could sell what was in one town on one execution, he might sell what was in the other town upon another execution, and the different creditors could resort to a court of equity to settle the matter between them. The complainant thinks that *Bank* v. *Blossom* stands upon doubtful ground. But we do not perceive that its force has been broken by any of the later decisions.

The case of *Durant* v. *Johnson*, *supra*, is quite in point. In that case there were simultaneous attachments, by two creditors, of the same parcel of land. One creditor levied upon the whole land, acquiring thereby a title to but a moiety of the land as against the other creditor. Therefore, an undivided moiety remained for the other creditor. By the law of Massachusetts (same as here) a creditor ordinarily could levy only by metes and bounds upon an estate held by the debtor in severalty. But the latter creditor, to relieve

himself from the predicament he was in, levied upon an undivided share of the land, and the levy was declared to be good. The court there say: "There is no statute provision declaring the effect of simultaneous attachments, or directing the mode of levying executions in such cases, but the court have applied to the cases that have occurred such legal principles as would most effectually do justice to the conflicting claims of creditors, without violating any existing laws." See *Sigourney* v. *Eaton*, 14 Pick. 414, and *Verry* v. *Richardson*, 5 Allen 107.

Upon principle, we think these proceedings should be sustained. We do not go so far as to say that an attachment and a sale of a part of an equity would be valid, when the whole is as open to attachment as any part of it. We confine our decision to the facts of this case. No injury need be suffered by the debtor, by selling his equity in this way. It may be an advantage to him. He can redeem from one sale and forego a redemption of the other, if he desires to. It is urged that a sale in two halves, by splitting the equity, would not bring so much money as a sale of the entirety would. That is not evident. But, if it was, any liability to loss could be avoided by the debtor, by redeeming from the sales, and less money would be required to enable him to do so. The purchaser holds the land subject to the mortgage. If the debtor redeems from both sales, his property is restored to him. If he redeems from one sale only, he becomes a tenant in common with the purchaser, subject to the mortgage. The debtor would then be in the same condition as he would be had he conveyed an undivided half of the land to the creditor, subject to the mortgage. That would be by no means an uncommon relation of parties in an ownership of an estate, and it might be brought about in several ways. Should the debtor, as a tenant in common, redeem the estate by paying up the entire mortgage, he would have an equitable lien upon the half not his own, for the sum he may advance upon it. Nor is there any contingency affecting the situation of the debtor which would debar his interests from a reasonable and sufficient protection: *Smith* v. *Kelley*, 27 Maine 237; *Bailey* v. *Myrick*, 36 Id. 50.

The complainant, *arguendo*, says that an article of personal property cannot be sold on execution in common and undivided shares. But it can be, if the debtor owns in it only an undivided

share. And in such a case the debtor's situation would exceedingly resemble the position of the debtor here.

The complainant next contended that the notice of sale given by the officer, as published in the "Portland Argus," was not a legal and sufficient notice. But this point is not open to the complainant. If it was admitted by the respondents to have been the notice in fact given, the point would have been open. But the respondents refuse to admit it, and rely upon the return of the officer, that he gave due and legal notice, as conclusive. The sworn return of the officer is conclusive. The rule is very general. The exceptions are very rare, and this case is not one of them: *Blanchard* v. *Day*, 31 Me. 494, 496; *Grover* v. *Howard*, Id. 546; *Huntress* v. *Tiney*, 39 Id. 237; *Bunker* v. *Gilmore*, 40 Id. 88; *Dutton* v. *Simmons*, 65 Id. 583; *Pullen* v. *Haynes*, 11 Gray 379. In *Sykes* v. *Keating*, 118 Mass. 517, the officer's return set out that the notice of the sale was of land on Union street in a city, and it was held that evidence that in the published notice of sale the premises were described as situated on Avon street was not competent to contradict the return. The remedy would be against the officer for a false return. We do not mean to intimate, however, that the published notice in the present case is not a perfectly good one. On the contrary, we do not now perceive any valid objection to it. It seems to be in the common form, as laid down in the books of forms for officers' proceedings. It is objected that the whole equity was advertised for sale upon each execution. So was the whole equity attached on each writ. The notice was proper enough as far as that point is concerned. *Non constat*, that the attachments would be in the way of each other when the day of sale should arrive. One of them might be paid or released or waived. The debtor was not prejudiced upon that ground to any extent whatever. The case of *Roche* v. *Farnsworth*, 106 Mass. 509, cited by complainant, does not apply.

Another objection is raised against the validity of the respondents' title. It appears that upon one of the executions, besides the sale thereon of one-half of the equity, a levy was also made, other real estate having been taken in satisfaction of a part of the execution. The execution with all the returns thereon was left with the register of deeds, to have the levy recorded. The register, very improperly for his own convenience in copying, cut the papers annexed to the execution apart; and when the execution was lodged with the clerk,

after the extent was recorded, the part of the papers containing the officer's doings in making sale of the equity was missing. The officer afterwards got the papers together and restored them to their original shape. He is accused of making an illegal amendment by so doing. But his act merely had the effect of preventing an amendment or alteration, or a diminution of his return.

The point stated by the complainant is that the execution, although returned to the clerk's office, had no officer's return of the sale of the half of the equity thereon until after three months from the time it was issued, nor until after the equity was conveyed by the debtor to the complainant. The answer is, that there was no legal necessity of returning the execution to the clerk's office within any definite time, in order to make the sale of the equity valid as against a subsequent purchaser. The registry of deeds discloses the state of the title: Rev. Stats., c. 76, § 33; *Ingersoll* v. *Sawyer*, 2 Pick. 276; *Prescott* v. *Pettee*, 3 Id. 331; *Gorham* v. *Blazo*, 2 Me. 232; *Emerson* v. *Towle*, 5 Id. 197; *Clark* v. *Foxcroft*, 6 Id. 296.

It becomes unnecessary to consider the other questions discussed on the briefs of counsel.

Bill dismissed, with costs to respondents.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

This case, though in a new aspect, seems in conformity with well-established principles. An officer, selling under an execution, executes a power; he acts as agent—agent in law—to transfer the debtor's title. The same rules which govern a debtor's own conveyance apply likewise to an officer's conveyance for him. On the one hand, the officer is governed by the same restrictions as the debtor himself. If by law the debtor could not convey directly to his wife, the officer, for the same reason, cannot; and the wife who bought would acquire no title: *Stetson* v. *O'Sullivan*, 8 Allen 321 (1864). On the other hand, the officer, unless restricted by statute, may convey, by levy or sale, in the same manner as the debtor himself could. And as it is clear that when a person makes two simultaneous deeds of the same land to two separate persons, which are delivered and recorded at the same time, each grantee takes a moiety as tenant in common: 13 Mass. 529; *Young* v. *DeBouhl*, 11 Rich. Law 638; *Challefoux* v. *Duchame*, 8 Wis. 287; or where a testator devises the same land to two different persons in fee, in separate clauses of the same will, the same result follows: 1 Jarm. on Wills 446; 1 Redf. on Wills 443; *Showat* v. *Bentley*, 2 M. & K. 166, Lord BROUGHAM; there seems to be no reason why the same effect should not be given to the deed of an officer, which is but a mere statutory conveyance from the debtor himself. Therefore it was early held in Massachusetts, that if two creditors simultaneously attach

the same land of their debtor, and duly set-off the same by *extent* on their executions, each creditor takes a moiety of the land so levied upon, on the ground that "when two men have each a title to the same piece of land, which is apparently perfect, and by which either might hold the whole, but for an equally good title in the other, they must each take a moiety :" *Shove* v. *Dow*, 13 Mass. 529 (1816) ; *Sigourney* v. *Eaton*, 14 Pick. 414 (1833) ; *Durant* v. *Johnson*, 19 Id. 544 (1837) ; *Perry* v. *Adams*, 3 Metc. 51 (1841). In this last case one creditor levied his execution on the whole by metes and bounds, it not being sufficient to satisfy the whole execution. The other simultaneously levied his upon 14-15ths of an undivided half of the whole, which was to the extent of his demand. The latter was held to be tenant in common with the former in the whole ; *i. e.*, he held 14-15ths of the undivided half, and not 7-15ths only.

The same rule is recognised in sales of personal property on executions. Thus, in *Campbell* v. *Ruger*, 1 Cow. 215, two executions were levied on the same personal property, at the same time, and, on being sold on execution, each creditor bid off different portions of the property at different sums. It was held that all the money was to be applied equally to both executions, until the smaller execution was fully satisfied, and the balance upon the larger execution until that was fully paid, if sufficient. See also *Nutter* v. *Connet*, 3 B. Monroe 204 ; *Lee* v. *Hinman*, 6 Conn. 170.

The same rule applies to attachments by the trustee process. If an officer at the same time serve two trustee writs against the same defendant and the same trustee, but for different creditors, each creditor holds an equal part of the funds in the trustee's hands, and not in proportion to the amount of their respective claims : *Rockwood* v. *Varnum*, 17 Pick. 289 ; *Davis* v. *Davis*, 2 Cush. 111. There is no apparent reason why the same rule should not apply to an officer's sale of an equity of redemption on two executions simultaneously. If the equity is bought by a third person, the proceeds are equally divided between the creditors, or if the creditors themselves bid off the equity, they hold in the same proportion. See *Thurston* v. *Huntington*, 17 N. H. 438 (1845) ; *Sigourney* v. *Eaton*, *supra*.

Whether the whole equity should be sold on one execution, and the proceeds divided between the creditors equally, or whether each creditor may sell an undivided moiety on his own execution, as was done in the leading case, seems to be a question between themselves, rather than as between them and the debtor. He would not be prejudiced by a separate sale. If it sold for less because of the separate sales, he could the more easily redeem. If it sold for more, it would pay so much more of his debt and perhaps produce a surplus for himself. *Quacunque via* he ought not to complain.

In some states the proceeds in cases of simultaneous attachments are not divided equally among the attaching creditors, but *pro rata* to their claims : *Porter* v. *Earthman*, 4 Yerg. 358 ; *Love* v. *Harper*, 4 Humph. 113 ; *Hill* v. *Child*, 3 Dev. 265 ; *Freeman* v. *Grist*, 1 Dev. & Bat. 217 ; *Wilcox* v. *May*, 19 Ohio 408.

See further on this subject, Drake on Attachments, p. 263 ; Herman on Executions, p. 274.

EDMUND H. BENNETT.